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No. 95-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

vs.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE SCREEN ACTORS GUILD, INC., AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, the Screen Actors Guild, Inc. ("SAG"), American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America, West, Inc. ("WGA"), hereby move for leave to file the attached brief *amici curiae*. Petitioners have granted but Respondents have

refused consent for SAG, AFTRA, DGA and WGA to file their brief *amici curiae* in this case.[1]

The question of the existence and content of a new non-statutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors and others employed in such productions, and WGA, the union representing writers employed in entertainment and non-fiction productions, as *amici*, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with employers engaged in coalition bargaining, SAG, AFTRA, DGA and WGA have a broad and important perspective on the need for Supreme Court review of the decision below.

The Circuit Court's decision--if allowed to stand--will have devastating effects on labor relations throughout the entertainment industry, consequences likely to exceed substantially those which will ensue in the world of sports.

The Petition for Certiorari as well as the *Amicus Curiae* filings of the United States in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and in support of the petition for rehearing in the Court of Appeals in this case (95-388 Pet. App. E), each correctly observe that the consequences of the Court of Appeals' decision will not be specific to sports but will extend to other areas of the economy, particularly entertainment. These filings do not provide specifics. Because of their particular perspective, SAG, AFTRA, DGA and WGA can elaborate on: the structure of labor relations in the entertainment industry; historical instances of the willingness of entertainment enterprises to engage in

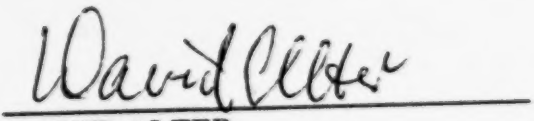
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[1] Attached hereto is the written consent of the Petitioners to the submission of this brief.

collusion in their markets for talent; and the manner in which such collusion would likely be fostered by the Court of Appeals' decision in *Brown*.

Because of their particular perspective, their interest in a just resolution of the case, and the singular importance of the issue presented, SAG, AFTRA, DGA and WGA request leave to file the attached brief as *amici curiae*.

Respectfully submitted,



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November 10, 1995

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BRIEF OF THE SCREEN ACTORS GUILD, INC., THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This Brief, in support of the Petition for Writ of Certiorari, is submitted in accordance with Rule 37 of the Rules of this Court. The Screen Actors Guild, Inc., ("SAG"), American Federation of Radio and Television Artists, ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America, West, Inc., ("WGA") have obtained and file herewith the written consent of the Petitioners to the submission

of this brief. Respondents, however, have refused consent. Accordingly, pursuant to Rule 37.2(b) of the Rules of this Court, SAG, AFTRA, DGA and WGA are filing herewith a motion for leave to file this brief as *amici curiae*.

INTEREST OF *AMICI CURIAE*

The question of the existence and content of a new non-statutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors and others employed in such productions, and WGA, the union representing writers employed in entertainment and non-fiction productions, as *amici*, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with employers engaged in coalition bargaining, SAG, AFTRA, DGA and WGA have a broad and important perspective on the need for Supreme Court review of the decision below.

ARGUMENT

The Petition for Certiorari persuasively delineates the profoundly harmful consequences for labor relations in professional sports which have already ensued from the decision in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and which will be compounded immeasurably by the decision of the Court of Appeals in this case. 95-388 Pet. at 26 *et. seq*. The Petition correctly observes that the effects of these decisions are not specific to sports but extend to other industries, most notably the entertainment industry. 95-388 Pet. at 26. The United States filed an *amicus curiae* brief in *Powell* in which it observed, also without elaboration, that the decision's "potential for mischief" extended, in particular, to the "entertainment industry generally, which has an economic structure similar to professional sports." Brief for United States as Amicus Curiae in *Powell* 18-19. Based on perspectives gained through their direct

experience representing employees in the primary areas of the entertainment industry, *amici* can readily confirm that the observations of Petitioners and the United States are well-founded.

As in professional sports, the Circuit Court's decision will discourage resolution of labor disputes in the entertainment industry through collective bargaining agreements. First, it is likely to lead to more strikes and lockouts. For entertainment employers, it will create powerful incentives to use collective bargaining as a mechanism for collectively imposing employment terms that severely restrain competition in their markets for performers, writers, directors and other employees without fear of antitrust violations. For employees, it may create incentives to seek union decertification and/or, at the very least, to withdraw from hitherto salutary multi-employer bargaining relationships. Second, simply because a union strikes over an onerous term, does not suggest that the strike will be effective. Unsuccessful strikes create labor unrest.

The Circuit Court's decision--if allowed to stand--will have devastating effects on labor relations throughout the entertainment industry likely to exceed substantially those which will ensue in the world of sports. This is primarily because the entertainment industry, both in terms of numbers of employees and in terms of revenue, is significantly larger than professional sports. Whereas professional sports accounts for roughly $5 billion in spectator revenues annually, entertainment (even narrowly defined as spectator entertainment including *e.g.* film-making, broadcasting, music, live theater, and other artistic performances) accounts for some $100 billion annually.[1] Since 1990, the motion picture industry alone has created more jobs than all of America's motor vehicles

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[1] *See*, Harold Vogel, *Entertainment Industry Economics* Cambridge University Press (3rd Ed. 1994).

and parts manufacturers, pharmaceutical companies, and the hotel industry combined.[2]

The entertainment industry, like the sports industry, is the province of employer conglomerates. There are now four established television networks, six major recording companies, seven film studios, and eight large book publishers. While there are small, independent firms engaged in producing movies and other entertainment products, more and more of the majors are being welded together into giant multimedia conglomerates.

Entertainers comprise one of the most extensively unionized occupations in the American economy. Industry-wide bargaining is virtually universal in most segments of the entertainment industry. Though the key arms of entertainer unionism emerged before the 1935 enactment of the National Labor Relations Act, the NLRA governs labor relations in the entertainment industry. Until now, the premise of federal labor legislation has been that employees have a better chance of securing a fair deal from their employers if they bargain collectively rather than individually. The holding that employees lose the right to sell their talents in a competitive market merely by exercising the right to pursue collective bargaining totally undermines this premise for employees in the entertainment industry.

The structure of labor relations in entertainment closely parallels that in sports. In both contexts, (1) the work force is heavily unionized; (2) industry-wide bargaining is almost universal; and (3) the employers in the entertainment industry collectively wield monopsony power.

Additionally, the entertainment and sports industries are the two areas of the economy where the accepted industry

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[2] James Aley, *Where the Jobs Are; The U.S. Has Added Millions Since 1990--Some in Surprising Places. Look For the Best Ones in Industries Where Knowledge Counts, The Time Inc. Magazine Co. Fortune,* Sept. 18, 1995, at 53.

practice is for the collective bargaining agreement to prescribe only a minimum framework of employment terms; because of the vast differences in the available roles for performers and in the skill required to fill such roles (i.e., star performers, featured performers, principal performers, background performers and extras), compensation terms are typically established in these industries through individual negotiations in which employees are routinely represented by "agents." *See H.A. Artists v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981). Individual Screen and TV Writers also routinely negotiate "overscale compensation" rates which exceed the minimums in WGA's collective bargaining agreements.

Collusion in these supposed individual negotiations can produce huge economic gains for the employers and cause employees to suffer substantial economic harm. To maximize profits, employers will obviously be tempted to restrain competition through collusion in the talent market, if they can do so with antitrust immunity.

The history of labor relations in the entertainment industry provides tangible illustrations of the willingness of entertainment employers to establish industry-wide practices. Circumstances surrounding the birth of the Screen Actors Guild in the 1930's provide a leading example. During the Depression, the movie studios agreed among themselves through their own organization, the Motion Picture Producers and Distributors Association, to institute a temporary 50 percent salary cut in current salary rates; a salary cap of $100,000 a year on the amount that could be paid to any performer, and a "right of first refusal" on any offers made to their contract players once the seven-year terms of their contracts expired. The prospect of such a change in studio-performer relations galvanized organization of the Screen Actors Guild as an independent union.[3]

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[3] Another example is the Waldorf-Astoria Agreement of the members of the Motion Picture Association of America ("MPAA") in 1947 not to hire anyone who declined to disavow communist associations. The agreement, a classic group boycott, imposed a fifteen-year blacklist on many leading

(Footnote continued)

The Screen Actors Guild and other entertainment industry unions have, until now, succeeded--by withholding their agreement--in blocking introduction of industry-wide salary caps, rights of first refusal and other similar employment terms which would hinder individual performers from realizing the full economic returns on their talents and appeal. The Court of Appeals' decision in *Brown* will enable employers in the entertainment industry to act without union agreement in imposing employment terms such as these which substantially eliminate competition in their markets for labor talent.

As stated above, the entertainment industry is many times larger than the sports industry and the potential for monopsony gains realizable through collusion is accordingly larger as well. A salient example of what might well occur involves the matter of sharing of gross profits, now a key feature of star performers compensation and an emerging factor for high profile screenwriters.[4] The *Brown* decision would provide producers with a vehicle for imposing an industry-wide cap on shares of gross profits payable to talent free of possible antitrust liability. The gains to the movie studios from such a device would dwarf the roughly $12 million apparently saved by the NFL Clubs through the Developmental Squad salary fix at issue in *Brown*.

Another example is the matter of residual rights, the talent's share of the revenues derived by the movie studio or other producer when the film or television product is reused in

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screen-writers of the time. The scheme could not plausibly have been effectuated other than through collective action of all members of the group.

A recent holding by the Second Circuit cited the *Brown* decision as support to immunize from antitrust challenge an agreement among sports clubs to blacklist a particular employee. *Caldwell v. American Basketball Ass'n*, ___ F.3d ___, 1995 WL 559522 (2d Cir. September 21, 1995).

[4] Based on his individual contract terms, Tom Hanks reportedly realized some $40 million as a share of gross profits on *Forrest Gump* through the end of 1994 and Jack Nicholson similarly made roughly $70 million from *Batman*.

a setting other than the one for which it was originally produced. The emergence of new technologies, beginning with television and now including video, cable, interactive multimedia, and also the sale by the studio of foreign rights continue to increase the dollar value of residual rights. As a consequence, the size of the talents' share in the value of residual rights has been the most contentious issue in Hollywood labor relations for decades and it remains so today. Notably, the right to share in TV residual revenues was first won for film actors by SAG through a lengthy strike in 1960 led by former President Ronald Reagan when he was president of the SAG, and the same year for screen writers in their strike. *Brown* would allow the movie studios collectively, without fear of antitrust liability, to limit or eliminate the share of residual rights payable to talent.

One key difference between sports and entertainment highlights entertainment employees' particular concern with the sports-industry generated version of the exemption at issue in this case. In the world of sports, there is on the surface a plausible justification for some degree of employer collaboration--a justification not shared in entertainment. Sports leagues claim to need common rules and assert those rules must be focused on generating competitive balance to make the product attractive. Whatever the weight of these arguments in sports,[5] they have no place whatever in the context of entertainment where the employers are not similarly engaged in leagues.

The consequence of the hands-off approach taken by the Court of Appeals in *Brown* is to give insulation from antitrust challenge to the entertainment world, which is far larger than the world of sports and which moreover presents none of the intrinsic justifications for a degree of employer collaboration.

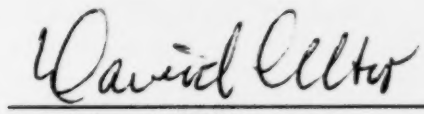
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[5] In the sports context, such arguments may justify a particular labor-market restraint under the "rule of reason", *see, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); they do not in any event warrant invocation of an antitrust exemption.

CONCLUSION

For the reasons stated herein, the Screen Actors Guild, Inc., American Federation of Television and Radio Artists, Directors Guild of America and Writers Guild of America, West, Inc., as *amici*, respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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November 10, 1995